United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1576

To be argued by
ALAN R. NAFTALIS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1576

B/S

UNITED STATES OF AMERICA,

Appellee,

—v.—

RICHARD G. WARME, a/k/a "RICHARD WARNER,"
and JAMES F. HEIMERLE,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

James F. Heimerle and Richard G. Warme appeal from judgments of conviction entered respectively on November 15, 1976, and November 16, 1976, in the United States District Court for the Southern District of New York, after a five-day trial before the Honorable Milton Pollack, United States District Judge, and a jury.

Indictment 76 Cr. 442, in four counts, was filed on May 29, 1976. Count One charged Heimerle and Warme, as well as Bernard Horwitz and Joseph Peters, with having conspired to possess, sell, pass and deliver counterfeit United States Federal Reserve Notes, in various denominations, in violation of Title 18, United States Code, Section 371. Count Two charged Heimerle and Warme with buying, selling, exchanging, transferring, receiving

and delivering counterfeit United States Federal Reserve Notes in one hundred dollar denominations, in violation of Title 18, United States Code, Sections 473 and 2. Count Three charged Heimerle and Warme with buying, selling, exchanging, transferring, receiving, and delivering counterfeit United States Federal Reserve Notes in twenty dollar and fifty dollar denominations, in violation of Title 18, United States Code, Sections 473 and 2. Count Four charged Heimerle and Warme with buying, selling, exchanging, transferring, receiving, and delivering counterfeit United States Federal Revenue Notes in one hundred dollar denominations in violation of Title 18, United States Code, Sections 473 and 2.

Prior to trial Warme moved to suppress a warning and consent to speak form executed by Warme on March 1, 1976 (GX #9) and a confession (GX #10) made by Warme on the same day. Judge Pollack held a hearing on this motion on September 20, 1976, following which the motion was denied.

Trial commenced on September 27, 1976, and ended on October 1, 1976, when the jury convicted Heimerle and Warme of Count One and a mistrial was declared on the three remaining counts.*

On November 15, 1976, Judge Pollack held a sentencing hearing concerning defendant Heimerle. Prior to trial, on September 21, 1976, the Government had filed a copy of a "Dangerous Special Offender Notice" with the Honorable Edmund L. Palmieri, in his capacity as Presiding Judge, Part I of the District Court. This notice set forth the Government's request for a sentencing procedure pursuant to Title 18, United States Code, Sections 3575 *et seq.* for Heimerle. On November 15,

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* Prior to trial, codefendants Horwitz and Peters pleaded guilty to Count One of the indictment.

1976, Judge Pollack held a Dangerous Special Offender Hearing, found that the defendant was a Special Dangerous Offender within the meaning of the statute and sentenced Heimerle to ten years imprisonment and a ten thousand dollar fine.

On November 16, 1976, Warme was sentenced to three years imprisonment by Judge Pollack. On the Government's motion, the Court dismissed the three outstanding counts in Indictment 76 Cr. 442.

Warme is presently released on bail, Heimerle is incarcerated on a prior federal felony conviction.

Statement of Facts

The Government's Case

A. Synopsis

The proof at trial established that from on or about November 1, 1975 and up to and including February 29, 1976, James F. Heimerle, Richard G. Warme, Bernard Horwitz, Joseph Peters, Angelo Oliveri and others conspired to possess, deliver and sell counterfeited Federal Reserve Notes ("FRNs") in 20, 50 and 100 dollar denominations. The counterfeit FRNs were obtained by Heimerle, who then employed the services of Horwitz and Peters to deliver the counterfeit FRNs to Warme. Warme then employed Horwitz and Peters in the distribution and sale of the FRNs. Among the persons Warme also attempted to use to distribute counterfeit FRNs for the conspiracy were Fred Glock, Angelo Oliveri, Robert Oliveri and Lawrence Miressi.

B. The Conspiracy

In November 1975 James F. Heimerle contacted Joseph Peters, whom he had met while they were both prisoners at Greenhaven Prison. Heimerle told Peters that he had received a quantity of counterfeited $100 Federal Reserve Notes *, which he hoped to sell or distribute. Heimerle asked Peters if he knew of anyone who might be interested in purchasing them. To add a further incentive to a prospective buyer, Heimerle also stated that he expected to have new printings of counterfeit Federal Reserve Notes of various denominations available soon. Peters told Heimerle that he would see what he could do to help him.

Peters then contacted Bernard Horwitz, who Peters knew to have a criminal record. Peters explained Heimerle's proposition and enlisted Horwitz's assistance in placing the counterfeit FRNs. Horwitz agreed to assist them and it was agreed that they should meet together with Heimerle. Soon thereafter, Heimerle, Peters and Horwitz met at a bar on Broadway in the Astoria Section of Queens, New York. (Tr. 18).

Heimerle told Horwitz that he was in a Federal Halfway House and that his time for the meeting was short. He further told Horwitz that he would have a sizable amount of counterfeit in his possession and asked Horwitz if he knew of anyone who might buy some of the counterfeit one hundred dollar FRNs. (Tr. 24). Horwitz told Heimerle that he would contact possible purchasers for the counterfeit FRNs. (Tr. 26).

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* Heimerle told Horwitz that he received the counterfeit FRNs "as a present by certain people for keeping his mouth shut on a previous crime." (Tr. 29).

"Tr." refers to the trial transcript; "H." refers to the suppression hearing transcript; "GX" refers to Government exhibits; "Br." refers to appellants' briefs; "App." refers to the appendix.

Subsequently, Heimerle showed Horwitz a sample of the counterfeit $100 FRNs. Horwitz commented that the notes were of very poor quality in that they had a yellowish tint. As a consequence, Horwitz stated that they could not obtain the usual market price of twelve points on the dollar (or $12.00 in genuine currency for each $100 in counterfeit FRNs). (Tr. 26). Horwitz then called Richard Warme and set up a meeting with him at the Cross County Diner in Yonkers, New York. (Tr. 27).*

Eventually Horwitz, Heimerle, and Peters drove in Heimerle's car to Yonkers. There they were joined by Warme and discussed the sale of the counterfeit FRNs in Warme's car. (Tr. 29). Warme told Heimerle that he had about $1500 in genuine currency available for the purchase of counterfeited FRNs. Heimerle agreed to the sale and they decided to make the transaction itself at another location. To effect that end, the conspirators drove in two cars to a garage in the Dobbs Ferry, New York area, which belonged to an employee of Warme. (Tr. 31). Peters, Warme and Heimerle then entered the garage. Before entering the garage, Heimerle removed the counterfeit FRNs from the back of his car and brought them with him into the garage. (Tr. 31). Once in the garage, Heimerle and Warme negotiated the sale of the counterfeit. (Tr. 374). At this point Heimerle, Horwitz and Peters returned to New York and Warme drove off in his car. Heimerle then informed Horwitz that he would soon have new counterfeit notes of better quality in 20,

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* Horwitz contacted Warme because Warme had previously told Horwitz that he was "interested in something where he could make fast money, because he was in a tight money situation." (Tr. 28).

50 and 100 dollar denominations. There notes, Heimerle said, would sell at a higher price. (Tr. 36). *

On December 10, 1975, Warme, Peters and Horwitz drove to the Cross County Shopping Center in Yonkers, New York. Warme gave Horwitz one of the yellowish counterfeited $100 FRNs and asked him to try and pass it in the Gimbels Department Store in the shopping center. Horwitz attempted to use the FRN in a purchase, but was foiled by an alert salesgirl who summoned the store's security officer. The Officer released Horwitz, who feigned innocence as to the counterfeit nature of the FRN. (Tr. 63-65, 341-43).

Later that month, Warme and Peters came to Horwitz's apartment. There they attempted to process the yellow colored counterfeited $100 FRNs to make them more passable. After processing the FRNs' Warme and Peters drove Horwitz to the airport so that he could fly to Las Vegas, Nevada. Once there, Horwitz, it was hoped, could pass some of the counterfeit or sell part of the package. Warme paid for Horwitz's flight ticket. (Tr. 39-42, 55-57, 344-46).

Once in Las Vegas, Horwitz found that he could not pass or sell the FRNs because of their poor quality. Consequently, Horwitz returned to New York with the counterfeit and gave it to Peters to return to Warme. (Tr. 56-63, 343-47).

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* Warme sold a portion of the yellow counterfeited $100 FRNs to Angelo Oliveri. The sale took place at Palumbo Distributors on Westchester Ave., Bronx, New York. In addition to Angelo Oliveri, his son Robert Oliveri and Robert's business partner, Lawrence Miressi were present during the sale. Angelo Oliveri later sold these counterfeit FRNs to Joseph Corbo. (Tr. 193-196, 251-255).

Sometime later,* Heimerle contacted Horwitz and told him that the new counterfeit 100 FRNs were available, and enlisted his aid in distributing them. (Tr. 36). Horwitz complained to Peters that he had only been offered the 100s and not the 20s and 50s Heimerle had previously discussed with him. Peters urged Horwitz "to go along with it" and subsequently brought Horwitz samples of the new notes, including the 20s and the 50s. These samples, Peters told Horwitz, came from James Heimerle. (Tr. 37).*

Peters and Heimerle subsequently traveled to Warme's home with a package of approximately $100,000 in the new counterfeited FRNs. Heimerle told Warme that the cost would be twelve points. Warme told Heimerle that he didn't have the entire $12,000 in genuine currency to complete the transaction. Warme assured Heimerle and Peters that he would get it and asked them if they would leave the package and return later. Heimerle agreed and he and Peters departed. (Tr. 335-36).

Warme, in anticipation of the delivery of the counterfeit by Heimerle and Peters, asked Angelo Oliveri, Lawrence Miressi and Robert Oliveri to come to his home in Irvington. The Oliveris and Miressi went to Warme's home and once there were shown a quantity of the counterfeited FRNs in twenty and fifty dollar denominations.

The Oliveris and Miressi told Warme that they wished to buy the counterfeit, but didn't presently have the

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* Peters testified that the new counterfeit FRNs became available around Christmas of 1975. (Tr. 334).

* Subsequently Heimerle confirmed that the samples came from him and further told Horwitz "there's quite a bit of waste on this" and that "he would have to account for that to the people he was with, and they were going to charge much more." The price, Heimerle said, would be twelve points. (Tr. 38).

genuine currency necessary to effectuate the purchase. They did, however, promise to return with part of the cash in a short time. For this propose, the Oliveris and Miressi returned to the Bronx to collect money owed to the younger Oliveri and Miressi in their cigarette distribution business. The trio was successful in this regard and returned to Warme's home with approximately $2700 in assorted genuine FRNs of denominations from one to twenty dollars. In exchange for the genuine FRNs, Warme supplied the Oliveris and Miressi with $50,000 in counterfeit FRNs. The Oliveris and Miressi promised to pay Warme the balance due on the $50,000 package which they were going to pay from the proceeds derived from the distribution of the counterfeit FRNs. In this latter regard, Warme and Angelo Oliveri agreed to try and "pass" the counterfeit together. With this agreement, the Oliveris and Miressi departed. (Tr. 255-60).

Heimerle and Peters returned to Warme's residence seeking the payment for the package of counterfeited FRNs they had previously delivered. Warme told Heimerle that he had only a portion of the money and asked Heimerle to leave the counterfeit, promising to pay him the balance owed. At first Heimerle opposed such a move, but subsequently Peters succeeded in convincing Heimerle to leave the counterfeit with Warme. (Tr. 338). *

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* Warme then enlisted the assistance of Fred Glock in an attempt to distribute some of his counterfeit. Warme previously had attempted to sell Glock some of the 'yellow hundreds", but Glock refused. (Tr. 231). Glock did agree to store some of the counterfeit and did drive Warme to a number of locations with the new counterfeit FRNs (batch number two). (Tr. 231-33). Among the locations Glock drove Warme was to Palumbo Distributors in the Bronx. (Tr. 234). Palumbo Distributors was the business owned by Robert Oliveri and Lawrence Miressi (Tr. 250).

On or about January 4, 1976, Heimerle and Peters drove in Heimerle's car to the Mayflower Diner in Dobbs Ferry, New York. At that location they were met by Richard Warme, and Warme and Heimerle discussed the money owed on the purchase of the counterfeit FRNs. After the trio concluded their discussions they separated. Unknown to the trio, they had been observed departing the diner parking lot by officers of the Dobbs Ferry, New York Police Department. The officers gave chase to the two cars, stopped them and identified the occupants of the cars as Heimerle, Peters and Warme. (Tr. 415-24).

Pressured by Heimerle to pay him the balance due on the counterfeit FRNs Warme called Angelo Oliveri in an attempt to get his aid in distributing some of the counterfeit FRNs. Some form of misunderstanding arose between the two, and Oliveri refused to speak with Warme. Angered by Oliveri's refusal to abide by his earlier promise to help Warme distribute some of the counterfeit, Warme telephoned Lawrence Miressi. In the call, Warme complained of Oliveri's failure to abide by their earlier agreement and attempted to enlist Miressi's aid in distributing the counterfeit and in spurring Oliveri into action. Warme informed Miressi that Angelo still owed money on the purchase, and that he wanted it. Warme also informed Miressi that unless payment was forthcoming they would have to return some of the counterfeit. Ultimately Angelo returned some of the counterfeit to Warme, after Warme visited Oliveri at his son's place of business. (Tr. 262-64, 202-04). Angelo Oliveri did succeed in selling some of the new counterfeit FRNs to Joseph Corbo. (Tr. 261-62).

The conspiracy came to an end on March 1, 1976, with Warme's arrest by agents of the Secret Service. * After his arrest, Warme executed a Secret Service "Warning

* Heimerle had been arrested on February 6, 1976, by Secret Service for his involvement in an unrelated counterfeiting transaction.

and consent to speak" form (Govt. x 9) and gave an oral confession concerning his and his co-conspirators' involvement in the conspiracy and substantive crimes. The confession was transcribed, but Warme refused to sign it at his attorney's suggestion. (Tr. 457-71).

The Defense Case

Warme called only one witness, Secret Service Special Agent George Hemmer. Hemmer was unable to answer mos defense questions because of lack of knowledge. (Tr. 515-22). However, Hemmer did deny that Warme's confession was based on what Special Agent Vezeris told the Secret Service stenographer. (Tr. 522).

Heimerle presented no evidence.

ARGUMENT

POINT I

The Court Did Not Err in Proceeding With the Trial During Warme's Unauthorized Absence.

The second day of trial was due to begin at 10:00 A.M. on September 28, 1976. The Court in closing the trial the evening before had instructed all parties to return to the Courtroom at 10:00 A.M. the following morning (Tr. 42-43). When counsel for all parties assembled in the courtroom in accordance with the Court's direction, Warme's then and present attorney told the other attorneys present and the deputy clerk of the Court that his client was not present and that he did not know where he was. Warme's counsel also stated that he would attempt to ascertain his client's whereabouts. The Court waited until 10:40 A.M. to permit Warme to arrive or his counsel to discern his whereabouts. At 10:40 Warme's whereabouts were still unknown and no explanation was offered to account for his unauthorized

absence.* At this point the Court granted the Government's motion to revoke bail and remand the defendant, if he reappeared, for the remainder of the trial. The Government then requested that the Court "wait a short period of time" before resuming the trial. The Court agreed and waited until 11:20 A.M. to resume the trial. The Court noted that there was still "no sign of the defendant Warme" and that "[t]here has been no explanation for his absence." The Court then invoked Rule 43 of the Federal Rules of Criminal Procedure as authority to proceed with the trial in light of the defendant's unauthorized absence. Counsel for Warme offered no objection to the Court's invocation of Rule 43 and the decision to proceed with the trial in his absence.**

Prior to the resumption of testimony, the Court received a note from a juror. The note indicated that the juror had failed to tell the Court on the voir dire that her father was a retired police officer. The Court invited counsel to submit questions for a voir dire of the juror. The voir dire was conducted and the juror was found satisfactory to all parties. No objection was raised by Warme's counsel to the juror, nor was a request made by his counsel for the right to re-open the voir dire of the juror should Warme re-appear at the trial.

A short morning session then proceeded without objection from Warme's counsel and the trial took a lunch

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* Warme's counsel did attempt to speculate as to the reasons for the absence, but also stated that neither he nor his office had been able to contact Warme.

** Appellant offers a novel theory in his brief arguing that although he "did not object to the Court's order, neither did he in any fashion whatsoever consent to proceeding in the defendant's absense." (Br. 28). This Court, of course, has long held that a failure to object waives an issue on appeal. *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (en banc), *cert. denied*, 383 U.S. 987 (1966).

break.* At 2:00 P.M. when the trial was to resume, Warme reappeared. Counsel for Warme offered, for the first time, an explanation for his client's absence from the morning session. He alleged that Warme had to rush his wife to the hospital and also care for his children in her absence. Counsel then asked for the Court to vacate its order revoking bail and remanding the defendant for the remainder of the trial. The Government did not object to the request and the Court granted the defense motion and vacated its prior order. Prior to granting the motion, the Court inquired as to Warme's failure to telephone the clerk of the Court or his counsel's office. Warme responded by representing that he had telephoned the Clerk of the Court at 10:30 and he further claimed that the Clerk's office said the trial was in progress and that they could not interfere.** The Court said it would "overlook" the defendant's absence this time due to the poor example defense counsel had set in respect to the Court's schedule, but warned Warme that

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* The morning session included the second half of the direct examination of co-conspirator Horwitz and the beginning of his cross-examination by Heimerle's counsel (who finished in the afternoon session). Warme's attorney did not cross-examine Horwitz until the afternoon session.

** It is interesting to note that although Warme allegedly received this response he was not spurred to take further action such as calling his attorney's office to inform him of the reasons for his absence. Warme's lack of interest in the proceedings was evidenced by his failure to take any further action until 11:20 A.M., nearly an hour later, when he allegedly called Judge Pollack's chambers. When confronted by the Court with an inquiry as to why he waited nearly an hour between calls, Warme responded "I assume they couldn't reach you". (Tr. 116, A. 238). Warme never accounted for his failure to call his attorney's office, nor was there any representation that he even tried. Moreover, there is nothing more than unsubstantiated allegation by Warme that all the events occurred as he described. No offer of proof—such as a statement by Court personnel or the judge's secretary—was made to substantiate any of them.

the Court would not tolerate any further absence. (Tr. 116, A. 238).* With Warme's return the afternoon session of the trial began. At no time did Warme's counsel request any measure to be taken by the Court to explain to the jury Warme's absence and subsequent re-appearance; nor was there any objection taken or motion for a mistrial due to Warme's absence from the morning session. Furthermore, Warme's counsel did not request a further voir dire of the juror in Warme's presence.

It is clear that a defendant in a criminal case has a constitutional right to be present at all stages of his trial. *Taylor* v. *United States*, 414 U.S. 17 (1973); F.R.Cr.P. 43(a); *United States* v. *Pastor*, 557 F.2d 930 (2d Cir. 1977); *United States* v. *Toliver*, 541 F.2d 958 (2d Cir. 1976); *United States* v. *Crutcher*, 405 F.2d 239 (2d Cir. 1968), *cert. denied*, 394 U.S. 908 (1969). However, it is equally well settled that a defendant may waive this right by voluntarily and deliberately absenting himself from the trial without good cause. *United States* v. *Pastor, supra; United States* v. *Tortora*, 464 F.2d 1202 (2d Cir.), *cert. denied*, 409 U.S. 1063 (1972); F.R.Cr.P. 43(b).** This Court has repeatedly held:

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* The Court never stated that it was satisfied with the validity of Warme's explanation as claimed in appellant's brief, (B. 31) but rather the Court noted that counsel for defendants had been late on a number of trial days and that defendants, the court noted, could not be punished for duplicating the behavior of the attorneys and then warned all to be prompt. (Tr. 116, A. 258).

** Rule 43(b) F.R. Crim. Proc. provides in part: "Continued Presence Not Required. The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived his right to be present whenever a defendant, initially present 1) voluntarily absents himself after the trial has commenced (whether or not he has been informed by the court of his obligation to remain during the trial)."

> "A defendant who deliberately fails to appear in Court does so voluntarily, and thus the important question is whether his absence can be considered a 'knowing' waiver. We hold that it can, the deliberate absence of a defendant who knows that he stands accused in a criminal case and that the trial will begin on a day certain indicates nothing less than an intention to obstruct the orderly processes of justice. No defendant has a unilateral right to set the time or circumstances under which he will be tried." *United States* v. *Tortora*, *supra*, 464 F.2d at 1208.

Tortora supports the conclusion not only that presence at trial may be waived, but also that this waiver may be inferred from the circumstances and from the defendant's activities. See also, *United States* v. *Taylor*, 478 F.2d 689 (1st Cir.), *aff'd* 414 U.S. 17 (1973); *Phillips* v. *United States*, 334 F.2d 589, 592 (9th Cir. 1964), *cert. denied*, 379 U.S. 1002 (1965); *United States* v. *Marotta*, 518 F.2d 681, 684 (9th Cir. 1975); See generally, *Diaz* v. *United States*, 223 U.S. 442, 450-451 (1912); *Illinois* v. *Allen*, 397 U.S. 337, 343 (1970); *United States* v. *Peterson*, 524 F.2d 167, 183-86 (4th Cir. 1975), *cert. denied*, 423 U.S. 1088 (1976). This principle was most recently reaffirmed by this Court in *United States* v. *Pastor*, *supra*.* In its opinion this Court noted the considerations the trial Court must evaluate:

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* Indeed, this case is surely governed *a fortiori* by both *Tortora* and *Pastor*, in each of which the defendant was not present at the commencement of the trial. Those cases thus involved considerably more difficult problems, not only with the express language of Rule 43(b), which solely permits absence "after the trial has commenced", but also with respect to the proper balancing of values. Self-evidently, it is less destructive to the orderly process of justice and the rights of a co-defendant to postpone a trial not even begun than, as here, to postpone a trial in which a jury has been selected and sworn, and testimony taken.

> Where the court finds that the defendant has voluntarily absented himself from the proceedings, it may decide to proceed in his absence only after balancing a "complex of issues" including the additional burdens, waste and expense inflicted upon the court, government, witnesses, and co-defendants, and the public's interest in seeing the accused brought to trial as well as the Court's responsibility to do so speedily. [Citations omitted]. While the Sixth Amendment demands that courts give the utmost solicitude to the defendant's right to be present at each stage of trial, it does not require the trial judge to accept at face value a defendant's claim of inability to appear in Court, particularly where other defendants are involved [Citations omitted], and where the government has spent considerable time, energy and money in preparing for trial and assembling witnesses and a panel of veniremen in the expectation that trial will proceed as scheduled. [Citation omitted]. 557 F.2d at 934.

In this case, it is clear that in balancing of the issues the trial court was correct in proceeding with the trial. The trial was already in progress and a jury had been selected in the presence of the defendant. Testimony had already been heard by the jury. The Government had subpoenaed a substantial number of witnesses, several of whom were waiting to testify on the day of Warme's absence. Among the witnesses for the Government were police officers from a small suburban police department whose presence required rescheduling on the part of that police department. Similarly, Special Agents of the Secret Service, some of whom had protection assignments in the presidential campaign, were standing by to testify. Warme's co-defendant Heimerle and his counsel were present and they did not object to the Court's decision to go forward with trial nor did they request a severance. Most significantly, no one, includ-

ing the defendant's own counsel, knew his whereabouts or when, if ever, the defendant intended to return to the trial. In this latter regard the Court did give a recess of one hour and twenty minutes to enable the defendant to appear or in the alternative enable his counsel to ascertain Warme's whereabouts.

Warme relies heavily on *United States* v. *Toliver*, *supra*, 541 F.2d 958. *Toliver*, however involved strikingly dissimilar circumstances from those before this Court. First, the defendant's whereabouts were known since her absence was due to her hospitalization. Second, the defendant's counsel objected to the taking of certain testimony in his client's absence.* In this case the whereabouts of the defendant could not be ascertained; the alleged illness was not the defendant's, but that of his wife; and his counsel never objected to the proceeding going forward in Warme's absence.**

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* In this regard, the Court noted that ". . . the government concedes, there is no indication that Askew [the defendant] waived her right to be present . . ."

** It should he noted that although in *Toliver* the defendant was ill, her whereabouts were known, and her counsel did object this Court still found that the trial Court's decision to go forward with the trial was harmless error. *United States* v. *Toliver*, *supra*, 541 F.2d at 965. Despite Warme's argument to the contrary, that holding directly applies to this case, and governs it should the Court conclude that *Tortora* and *Pastor* differ from this case. Warme's absence occurred only during a brief passage of one of the witnesses. While the testimony that occurred during that time did directly inculpate Warme, it was in that respect superrogatory with considerable other evidence in the overwhelming case against him. Furthermore, while Warme could have examined the transcript of the portion of the testimony he missed and requested that that portion be repeated in his presence, he elected not to do so. In short, Warme at trial treated the matter of not being present during trial as of no consequence to his ability to obtain a fair trial; his contrary posture on appeal clearly smacks of appellate afterthought.

In short, the District Court acted entirely properly in this case under the difficult circumstances presented to it by the defendant. Warme's arguments to the contrary should be rejected.

POINT II

The Trial Court Properly Evaluated the Admissibility of Warme's Confefssion.

Warme makes a dual claim of error with respect to the Courts evaluation of the admissibility of Warme's confession. First, Warme argues that the Court failed to consider whether his constitutional rights were violated by the Secret Service Agents when they questioned him. The second claim is based on Warme's new allegation that the confession is inadmissible under Title 18, United States Code, Section 3501(c). These arguments are without merit.

Sometime between 10:00 and 10:30 A. M. on March 1, 1976, Special Agents of the Secret Service arrived at the offices of the Ninth Homicide Squad, located in the Bronx, New York, and placed Warme under arrest. At the time of this arrest, the Agents advised Warme of his rights pursuant to *Miranda* v. *Arizona*, 384 U. S. 436 (1966). (H-113). The Agents did not question Warme at the Station House but handcuffed and transported him in a Secret Service vehicle to the Secret Service offices located in the World Trade Center in Manhattan. Once in the vehicle, he was again instructed by the Agents of his constitutional rights. The Agents may have discussed the reasons for his arrest with Warme while they were driving to the World Trade Center, but took no statement from him at that time. Upon arrival at the Secret Service Headquarters, Warme was read and shown a copy of the Secret Service "Waiver and Consent" form (GX9), which reiterated Warme's constitutional

rights. Warme signed the form, which was witnessed by Secret Service Agents Vezeris and Hemmer. The Agents proceeded to question Warme, who provided Agent Vezeris a statement. After admitting his and his coconspirator's involvement in the conspiracy, Warme asked to use the telephone, and one was provided. Warme called his wife. Prior to this request Warme never 1) asked to use the telephone; 2) requested the services of an attorney, or 3) asked the Agents to cease their questioning. After the telephone call, Special Agent Vezeris brought a stenographer into the room and Warme, with Vezeris' assistance, repeated his statement to the stenographer, who transcribed it. The stenographer then typed the statement and brought it to Agent Vezeris for Warme's signature. The Agent submitted the transcribed statement for Warme's signature, but before he could sign the statement, an attorney hired by Warme's wife to represent him arrived and advised Warme not to sign any statement. Warme complied with his attorney's recommendation. (H. 16, 44-48).

On this appeal, Warme concedes that he was advised of his constitutional rights before being questioned. (Warme Br. 36). Rather, he alleges that he was denied access to counsel when he asked to call an attorney. In support of this claim, Warme states that Agent Hemmer, whom he incorrectly describes as being "the Agent who was conducting the interrogation, * testified that "Warme may have requested a lawyer during his interrogation and prior to dictating his statement to a stenographer. (Warme Br. 37). In fact, Hemmer testifed he couldn't recall when Warme requested an attorney. (H-81-84).

Agent Vezeris' recollection was more specific; he testified that Warme asked to use the telephone near the

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* Actually Hemmer denied being the Agent primarily in charge of the interrogation and testified to being absent during parts of it. (H. 75 and 79).

end of their questioning. Vezeris further testified that while Warme made a telephone call, he did not ask for a lawyer.

At the hearing, Warme testified that he never gave the statement to the Agents, that he persistently demanded an attorney, and signed the "Waiver and Consent to Speak" form believing it was a receipt for personal property despite the obvious text of that form. (B5, 139, 144-5).

At the conclusion of the hearing, Judge Pollack denied the motion to suppress with a brief oral opinion. He specifically noted that disputed issues of credibility were resolved against Warme, and that Warme's rights had in fact been respected. The Court found that Warme was repeatedly advised of these rights and that his confession was made "voluntarily and free of any coercion or duress of any kind." (H. 148). Warme's claim on appeal, while confused, appears to be two-fold. First, he claims that his confession was not in fact voluntary, but was the product of coercive action by the agents. In making this argument, he faces the burden of showing that Judge Pollack's findings were "clearly erroneous," as this Court has specifically noted in reviewing trial court findings on the voluntariness of confessions. *United States* v. *Friedman*, Dkt. No. 77-1189, slip op. 4955, 4957 (2d Cir. July 27, 1977); *United States* v. *Luccetti*, 533 F.2d 28, 36 (2d Cir. 1976). Particularly since Warme's claim on appeal is based almost entirely upon his own testimony (which Judge Pollack disbelieved) and upon dubious inferences from the testimony of Agent Hemmer (who testified that he was not present during many of the events), Warme has not come close to meeting this burden. Second, Warme claims that Judge Pollack did not address the issue of whether he in fact asked for a lawyer during the interview. This claim ignores the fact that the assertion is solely based upon Warme's testimony, and was totally refuted by the agents. Since Judge Pollack specifically

found that he credited the agents' version rather than Warme's, the present attack on the findings is wholly fatuous.

The second of Warme's claims concerning the admission of the confession is based on his newly raised allegation that claimed unreasonable delay in his arraignment makes his confession inadmissible under Title 18, United States Code, Section 3501(c). First, it should be noted that this claim was never raised below and the appellant never objected to the confession's admission on this basis; therefore this claim cannot be raised on appeal. *United States* v. *Fuentes*, Dkt. No. 77-1083, slip op. 5883, 5889-90 (2d Cir., Sept. 14, 1977); *United States* v. *Braunig*, 553 F.2d 777 (2d Cir.), *cert. denied*, — U.S. — (June 6, 1977); *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 987 (1966). At any rate, even if the issue could be raised on appeal, it is without merit. Warme claims that his custody by the authorities began at 3:00 A.M. on March 1, 1976; the record below fails to support this claim.

On March 1, 1976, at approximately 3:00 A.M., New York City police officers accompanied by officers of the Irvington, New York; Police Department went to Warme's home and asked Warme to accompany them to the Bronx for questioning. Warme agreed to go with the officers and they drove him to their Office. Warme was not placed under arrest nor did they use force to secure his agreement to come. (H. 105 and 112). Warme was never handcuffed by the officers at any time during his stay in the Bronx precinct house. (H. 111). During the course of the interview the Police Officers questioning Warme gave him coffee. (H. 108, 109 and 111).

At that time, Warme provided the police officer with a statement concerning the investigation of the homicide of Angelo Oliveri. At 8:00 A.M., the police officer telephoned the Secret Service and was advised that they wished to see Warme. At 10:00 A.M. the Secret Service

Agents arrived and then for the first time placed Warme under arrest. At the time the agents placed Warme under arrest, they read him his constitutional rights from a card. (H. 113). After searching him,* the Secret Service Agents departed with Warme for their office.

It is clear that Warme's "custody" did not begin until he was placed under arrest by the Secret Service Agents between 10:00 and 10:30 A.M. on March 1, 1976. It is also clear that Warme was not in "custody" when he was questioned by the police officers. The Supreme Court has defined custodial interrogation as "mean[ing] questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda* v. *Arizona*, *supra*, 384 U.S. at 444. In this case, Warme was simply not arrested at the time of his initial contact with the agents; rather, he voluntarily accompanied the officers to the station house, was never handcuffed or placed in a cell and never requested a lawyer or asked to go home. See *Oregon* v. *Mathiason*, 45 U.S.L.W. 3505 (January 25, 1977); *United States* v. *Beckwith*, 425 U.S. 341, 347 (1976).

Once arrested by the Secret Service Agents Warme was promptly processed for arraignment. He was directly transported to the Secret Service headquarters, and, following standard procedures, was photographed, fingerprinted and interviewed by the agents only after being advised of his rights and executing the waiver form previously described. After his statement was taken and transcribed he was promptly transported to the Federal Courthouse and soon thereafter was arraigned before a

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* Further evidence of the non-custodial circumstances surrounding Warme's initial appearance at the Police Station is that although the police officers were investigating a homicide and Warme was a target (H. 111), they never searched him for weapons. Surely that would not have been, the procedure were they arresting him.

United States Magistrate. This action fully complied with Rule 5(a), Federal Rules of Criminal Procedure, and *Mallory* v. *United States*, 354 U.S. 449 (1957).*

In short, Warme's claim is meritless.

POINT III

Neither Warme Nor Heimerle Can Complain of the Redacted Version of the Confession.

A. Warme's Claim

Warme claims that the trial court erred when it admitted into evidence the redacted form of the confession he gave Secret Service agents after his arrest on March 1, 1976. Warme argues that notwithstanding the requirements of *Bruton* v. *United States*, 391 U.S. 123 (1968), the redaction of the confession substantially prejudiced him because, we are now told, it conflicted with the theory of his defense. That theory was that the "warning and consent to speak form" (GX 9) executed on March 1, 1976, was signed by Warme in the mistaken belief that it was a receipt for his personal property taken by the Secret Service agents at the time of his arrest and that the confession offered in evidence by the Government was manufactured by agents of the Secret Service.** This argument is frivolous.

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* Indeed, this Court has found that confessions made after *Miranda* warnings have been given are admissible even if they are made more than six hours after arrest. See *United States* v. *Duvall*, 537 F.2d 15 (2d Cir. 1976).

** While Warme made this claim in his testimony at the pretrial suppression hearing, there was no testimony at trial which made such a claim or laid a foundation for such a claim. This argument was put before the jury only in the summation arguments of Warme's counsel.

The Warning and Consent to Speak form was admitted into evidence and was available for examination by members of the jury. (A. 404). The confession was redacted so that it could be offered into evidence in the joint Warme-Heimerle trial. Prior to trial, counsel for the government informed Warme's counsel that he intended to offer the confession, but would redact it so that it would be admissible under *Bruton*. At no time did counsel for Warme seek a severance so that the confession could be offered by the Government in its un-redacted form in a trial solely against Warme. *

Furthermore, although couched as an objection as to the admissibility of the redacted confession, Warme's attack on this evidence really amounts to a jury argument.** His claim is merely that he offered evidence, contrary to the Government's interpretation, that the Government had made it up. Although Warme was surely entitled to have his explanation for this confession presented to the jury, see *United States* v. *Barry*, 518 F.2d 342 (2d Cir. 1975), the existence of his alternate explana-

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* This fact alone suffices to deny Warme's claim. Under this Court's numerous decisions in *United States* v. *Indiviglio, supra; United States* v. *Braunig, supra;* and cases there cited, Warme clearly waived any objection he might have had under the theory he now espouses by now making it in the District Court. See also *United States* v. *Fuentes, supra.*

** In addition, it should be noted that the record at trial offers absolutely no evidence whatever to substantiate Warme's claim that the confession was manufactured by the Secret Service. Warme alleges that his sole defense witness, Special Agent George Hemmer, "strongly contradicted much of what Special Agent Vezeris had testified to as part of the Government's case and tended in large measure to support the defendant's position with respect to the confession." (Warme's Br. 46), but the record does not bear out this claim. For example, Warme argues that Special Agent Hemmer "had been the agent supposedly in charge of questioning Warme." In fact, Hemmer's testimony, far from contradicting Special Agent Vezeris, tended to be inconclusive due to Hemmer's lack of knowledge regarding most of Warme's questions on direct examination. (Tr. 516-23).

tion does not provide the basis for the exclusion of the redacted confession. Moreover, if Warme wished the jury to consider an un-redacted confession to more adequately comport with his defense theory, he should have made a motion for severance.*

B. Heimerle's claim

Heimerle also complains that the Court's admission of the redacted version Warmes confession prejudiced him and denied him the right of cross-examination. This argument is without merit.

As noted, during the trial a confession given by Warme to Special Agents of the Secret Service on March 1, 1976, was offered by the Government as evidence of Warme's participation in the crimes charged in Indictment 76 Cr. 442. Prior to offering the confession the Government submitted a redacted form of the confession in order to comport with its obligation under *Bruton* v. *United States*, *supra*, 391 U.S. 123. The redacted version offered by the Government omitted all references to Heimerle. Counsel for Heimerle made a series of requests to the Court for further redaction of the statement. In conformity with the request of Heimerle's counsel, Judge Pollack further redacted Warme's confession. The redacted confession was not objected to in any way by Heimerle, nor did he object to its admission into evidence (Tr. 468).**

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* In any event Warme's confession represented only a small portion of the evidence the Government offered at trial to prove Warme's guilt. While Warme's defense theory might try to explain the existence of the confession, it could not serve to account for the existence of the other overwhelming evidence, including the testimony of five fellow co-conspirators, which established Warme's role and participation in the conspiracy. Viewed in this light the confession was merely cumulative in light of the overwhelming evidence against him and was harmless.

** Furthermore, the United States had informed Heimerle's counsel prior to trial of its intention to offer a redacted form of Warme's confession and despite his prior knowledge, Heimerle never requested a severence from Warme in the instant indictment.

A copy of the full text of the confession had been furnished to Heimerle's counsel many months prior to trial. It is well-settled that in order to comport with the prohibitions of *Bruton* the Government may introduce into evidence a redacted form of co-defendant's confession. *United States* v. *Trudo*, 449 F.2d 649 (2d Cir. 1971); *United States* v. *Dady*, 536 F.2d 675 (6th Cir. 1976); *United States* v. *Garrett*, 542 F.2d 23 (6th Cir. 1976). While the redacted confession can not clearly inculpate other defendants standing trial, where the redacted confession can not clearly inculpate other defendants standing trial, where the redacted statements admitted are not clearly inculpatory, nor vitally important to the case against other defendants the redacted confession is admissible. Furthermore, as this Court has held even if the jury can infer the identity of a defendant from a redacted confession that in itself would not constitute a violation of *Bruton* nor grounds for its exclusion from exidence. *United States* ex rel. *Nelson* v. *Folette*, 430 F.2d 1055 (2d Cir. 1970). To warrant exclusion, the redacted confession "must powerfully incriminate the allegedly prejudiced defendant." *United States* v. *Wingate*, 520 F.2d 309, 314-15 (2d Cir. 1975).

In this case the redacted confession clearly does not inculpate Heimerle. In its redacted form there are absolutely no references to Heimerle, while there are specific references to other conspirators Peters, Oliveri, Glock and Horwitz. While Heimerle strains the record to find extraneous statements to form a basis for arguing that the confession indirectly inculpated Heimerle, he cites only one sentence in the redacted version of the confession. The non-redacted version of the statement read in part "Joe and Jimmy were going to sell . . ."; (A. 409) the redacted form of the confession read "Joe were going to sell . . ." (A. 406). This grammatical form, not uncommon in the speech patterns of working-class citizens such as Warme, could hardly be read by the jury as being a

statement inculpating Heimerle, let alone being "powerfully incriminating" towards Heimerle.*

Heimerle argues that co-conspirator Peter's statement that "this man gave a confession" could "only refer to Heimerle." (Heimerle Br. 13). This interpretation is fantastic in light of the entire trial record, where the jury heard evidence that defendant Warme had given a confession concerning his involvement in the conspiracy. Nowhere in Peter's testimony nor in the testimony of any other witness is there any indication that Heimerle ever gave a confession.

Similarly, Heimerle strains the record to suggest that portions of the summation caused the jury to know that references to Heimerle had been deleted from the confession. In a reading of the two short portions of the summation cited by Heimerle, there is simply no reference to Heimerle as being included in Warme's confession.** Heimerle also complains that the retyping of the second page of the confession served to inform the jury that references to Heimerle had been deleted. This argument is also clearly without merit. First, there was no objection on the part of Heimerle's counsel to the retyping of the second page of the confession. In fact, by retyping the second page of the confession the Court conformed with its obligations under *Bruton* and its progeny. See, e.g. *United States* v. *Wingate*, *supra*, 520 F.2d at 314. To avoid any adverse inference on the part of the jury as to the retyped second page of the confession, the Government requested, and was granted by the Court, a cautionary

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* Furthermore, of course, the statement could easily have been changed from "were" to "was" had Heimerle so requested or made a contemporanesus objection. However, he chose not to do so.

** This fact distinguishes this Court's decision in *United States* v. *Gonzalez*, 555 F.2d 308, 314-16 (2d Cir. 1977), where the prosecutor in summation specifically drew attention to an aspect of an out-of-court statement of one defendant that inculpated another.

instruction for the jury. The Court told the jury that it had the second page of the confession retyped and that the jury was not to draw any conclusions for or against any party to the trial concerning the retyped second page. The Court further told the jury the reasons for having the second page retyped did not concern them. (Tr. 660-61). No objection was made to this aspect of the charge.

Under the circumstances described, Judge Pollack certainly did not abuse his discretion in admitting the redacted confession nor did its admission place Heimerle in a prejudicial setting or deny him the right to cross-examination.*

POINT IV

All Statements Producible Pursuant to Title 18, United States Code, Section 3500 Were Delivered to Counsel for the Defendants.

Warme complains that he did not receive all the material discoverable pursuant to Title 18, United States Code, Section 3500. This claim is wholly frivolous.

First, it should be noted that Warme suggests in his Brief that the only 3500 material the prosecution surrendered to counsel for the defense were "two typewritten pages" (Warme Br. 50). This is factually inaccurate.

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* Finally, even if the admission into evidence of Warme's redacted confession was a violation of *Bruton*, it constituted nothing more than harmless error since the other evidence against Heimerle was so overwhelming and Warme's statement was merely cumulative. *Harrington* v. *California*, 395 U.S. 250, 254 (1969); *United States* v. *Cheung Kin Ping*, 555 F.2d 1069, 1071 (2d Cir. 1977) (admission of confession harmless).

Counsel for the defendants received a substantial quantity of Section 3500 material over the course of the trial.*

Government counsel assured all trial counsel that he had diligently searched the records for all statements and reports in the possession of the United States that were made by any of the Government witnesses and related to their testimony on direct examination. Ultimately, the Government submitted to Judge Pollack for *in camera* inspection certain investigative reports and grand jury testimony related to other investigaions that counsel for appellant Warme argued he was entitled to under Section 3500. Judge Pollack made an *in camera* inspection of all of these reports and grand jury testimony and found that none of them was discoverable pursuant to Section 3500. In particular, the Court noted:

> "I have marked as Exhibit '4' the material that someone thought might contain 3500 material. I went through it. I heard the witness testify, also, and in my judgment there is absolutely nothing in there that is 3500 material that the Government should have turned over to the defense."

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* This material included grand jury testimony of Joseph Peters, dated March 4, 1976; grand jury testimony of Bernard Horwitz dated March 2, 1976 and March 23, 1976; grand jury testimony of Robert J. Oliveri, dated April 22, 1976; grand jury testimony of Lawrence Miressi, dated March 18, 1976, April 20, 1976 and April 22, 1976; grand jury testimony of Special Agent John Vezeris, dated March 11, 1976; grand jury testimony of Fred Glock, dated April 29, 1976; criminal "rap sheets" of Bernard Horwitz and Joseph Peters; case report of Special Agent Samuel J. Zona, dated January 26, 1976; police report and records from the Dobbs Ferry Police Department prepared by Sergeants Raymond Malara and James Neal; police blotter report of Sergeant James Neal, dated January 5, 1976; and a psychiatric evaluation report of Joseph Peters prepared by Gurston Golden, M.D., dated August 6, 1976.

Warme argues that all or a portion of these statements are discoverable since some deal with Joseph Corbo.*

This purported 3500 material was returned to the Government after the District Court's *in camera* examination pursuant to 18 U.S.C. § 3500(c) and is available for inspection by this Court pursuant to that provision.

Finally, even if the question were close—which it is not—it would still be one for the District Court to resolve. Producibility under § 3500 is a matter "within the good sense and experience of the district judge . . . subject to the appropriately limited review of the appellate courts." *Palermo* v. *United States*, 360 U.S. 343, 353 (1959). The "appropriately limited review" of which the Supreme Court spoke in *Palermo* has been held to be a review only for abuse of discretion, *United States* v. *Augenblick*, 393 U.S. 348, 355 (1969); *United States* v. *Pacelli*, *supra*, at 1118, and for "clear error" in the factual finding of producibility *vel non*. *Campbell* v. *United States*, 373 U.S. 487, 493 (1963); *United States* v. *Sten*, 342 F.2d 491, 494 (2d Cir.), *cert. denied*, 382 U.S. 854 (1965); *United States* v. *Birnbaum*, 337 F.2d 490, 498 (2d Cir. 1964); *United States* v. *Cardillo*, 316 F.2d 606, 616 (2d Cir.), *cert. denied*, 375 U.S. 882 (1963).

In short, the argument of appellant Warme concerning the production of Section 3500 material is without merit.

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* He alleges this matter is discoverable because "according to prosecution's theory of the case" [Corbo was] a co-conspirator" (Brief 51). Joseph Corbo was not named as a co-defendant or co-conspirator in Indictment 76 Cr. 442. He did not testify at trial and was the subject of an independent prosecution. The allegation by the appellant that Corbo was a co-conspirator is meritless and without a factual basis.

POINT V

No Error Was Committed in Adducing the Fact That Witnesses Peters and Horwitz Met Heimerle in Prison.

Heimerle complains that error was committed when the prosecution adduced through witnesses Peters and Horwitz the fact that they had met Heimerle in prison. This contention is entirely frivolous.

Heimerle charges that the questions were a "reckless" act on the part of the prosecutor done as "a deliberate attempt to add more prejudice and to obtain a conviction based not on the evidence before the jury but on the bad-man theory of guilt." (Heimerle Br. 19). This allegation is completely without basis in the record. While Heimerle cites testimony (Transcript 91, 92 and 317, also appendix pp. 213-14) as evidence of the prosecution's "recklessness," an examination of these portions of the record clearly discloses the questions charged as being reckless were never posed by Government counsel. Rather, the record clearly shows that the questions posed to witness Horwitz that elicited his answer concerning his meeting Heimerle in prison came as a consequence of cross-examination by Heimerle's trial counsel. In fact, Horwitz never testified that he had met Heimerle in prison, but stated:

> . . . he [Heimerle] made a reference to the fact that he had to get back to the Hotel Woodward at eleven o'clock. He was in the half-way house. (Tr. 91A, 213).

The question that elicited Peter's response that he had met Heimerle in prison came as a consequence of Judge Pollack's questioning of Peters. (Tr. 317).

In addition, the cases relied upon by Heimerle are wholly distinguishable since they involve instances where a reference to the defendant's being incarcerated was the

only occasion on which the jury was made aware of the defendant's otherwise inadmissible prior criminal activities. Here, as indicated in Point VI, the jury was properly made aware of Heimerle's prior counterfeiting convictions and the passing references to the halfway house and his meeting in prison were not only inadvertent but of no prejudicial impact; in addition, they were themselves of independent probative value since they demonstrated Heimerle's prior relationship with the co-conspirators Peters and Horwitz. In any event, the Court's cautionary instruction to the jury following Peter's statement that he had met Heimerle in prison cured any possible prejudice. See *United States* v. *Stromberg*, 268 F.2d 269 (2d Cir. 1959); *United States* v. *Rosenwasser*, 550 F.2d 806, 809 (2d Cir. 1977).

POINT VI

The District Court Properly Received in Evidence Certified Copies of Two Prior Counterfeiting Convictions of Heimerle.

Heimerle complains that Judge Pollack abused his discretion in permitting the Government to introduce in evidence certified copies of two prior counterfeiting convictions. His contention is frivolous.*

Notwithstanding Heimerle's heavy reliance upon authorities from other jurisdictions, the law in this Circuit is well settled:

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* Heimerle attacks the relevance and probative value of the facts underlying the convctions. He wisely does not challenge the established law that the Government may prove the facts underlying prior convictions by the method of introducing certified copies of the judgment of conviction. See F. R. Evid 803(22); *United States* v. *Vario*, 484 F.2d 1052, 1054-55 (2d Cir. 1973), cert. denied, 414 U.S. 1129 (1974).

> "Other crimes evidence is admissible on the Government's case in chief unless introduced *solely* to show the defendant's criminal character, provided that its probative worth outweighs its potential prejudice." *United States*, v. *Papadakis*, 510 F.2d 287, 294 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975) (emphasis in original).

See also, United States v. *Braunig*, 553 F.2d 777, 781 (2d Cir.), — U.S. —, (June 6, 1977); *United States* v. *Magnano*, 543 F.2d 431 (2d Cir. 1976); *United States* v. *Payden*, 536 F.2d 541 (2d Cir. 1976); *United States* v. *Natale*, 526 F.2d 1160 (2d Cir. 1975), *cert. denied*, — U.S. — (1976). See, generally, F. R. Evid. 404(b).

The first of the two prior convictions, Indictment 72 Cr. 1330, was for violations of Title 18, United States Code, Sections 472 and 371. That conviction concerned Heimerle's involvement in the sale and conspiracy to sell counterfeited FRN's in fifty and one hundred dollar denominations. These same denominations of counterfeit FRN's were sold by Heimerle in the course of this conspiracy. Similarly, the second indictment, 76 Cr. 146, charged Heimerle with violations of Title 18, United States Code, Sections 473 and 371. That conviction concerned Heimerle's sales of and conspiracy to sell counterfeit one hundred dollar FRN's. Significantly this conviction concerned counterfeit FRN's of the same denomination as the conspiracy below and in part, overlapped that conspiracy in time.

The prior acts in question, then, compared very favorably with prior acts found sufficiently similar to merit admission in several decisions of this Court. See, e.g., *United States* v. *Leonard*, 524 F.2d 1076, 1091 (2d Cir. 1975), *cert. denied*, — U.S. — (1976); *United States* v. *Kaufman*, 453 F.2d 306 (2d Cir. 1971) (false statements in tax returns admissible in prosecution for filing false affidavits under Soldiers and Sailors' Civil Relief Act); *United States* v. *Williams*, 470 F.2d 915 (2d Cir. 1975).

The relevance of the prior similar act evidence as probative of Heimerle's criminal intent is underscored in Heimerle's own brief by his suggestion that one of the two prior convictions was so proximate to the facts of the present case as to "suggest . . . issues of double jeopardy." (Br. 18). Moreover, the fact that the other conviction has since been set aside on collateral attack for asserted violations of the Interstate Detainer Act * in no way detracts from the probity of the *facts* underlying that prior counterfeiting conviction as it bears upon Heimerle's intent regarding the facts of this case, since the issue litigated on collateral attack had nothing to do with the accuracy of the facts.

Finally, both the relevance of this evidence and whether its probative value outweighed any prejudicial impact are matters exclusively vested in the sound discretion of the District Court save in cases of grave abuse. *United States* v. *Gottlieb*, 493 F.2d 987, 991-92 (2d Cir. 1974); *United States* v. *Leonard*, *supra*, 524 F.2d 1076; *see also*, *United States* v. *Robinson*, Dkt. No. 76-1153, slip op 5021 (2d Cir., July 28, 1977) (*en banc*); *United States* v. *Campanile*, 516 F.2d 288, 293 (2d Cir. 1976); *United States* v. *Ravitch*, 421 F.2d 1196, 1204-05 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970). Here the evidence offered was clearly probative of the crime charged, was not outweighed by prejudicial impact, and was therefore properly admitted.

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* The Government has filed a notice of appeal from the decision vacating Heimerle's prior conviction on his motion pursuant to Title 28, Unted States Code, Secton 2255.

POINT VII

The Dangerous Special Offender Procedure Did Not Deprive Heimerle of Due Process of Law.

On September 21, 1976, the United States filed a notice to the Court that James F. Heimerle was a Dangerous Special Offender. This notice charged Heimerle as being a habitual offender pursuant to 18 U.S.C. § 3575 (e) (1) and a professional criminal pursuant to Title 18, United States Code, Section 3575(e)(2). This notice was filed and sealed by the Honorable Edmund L. Palmieri as presiding Judge of Part One of the United States District Court for the Southern District of New York, pursuant to the provisions of Title 18, United States Code, Section 3575 *et seq.*

Following the conviction of Heimerle on October 1, 1976, an order was submitted to Judge Palmieri for the unsealing of the Dangerous Special Offender Notice. On November 15, 1976, a hearing was held by Judge Pollack pursuant to the provisions of 18 U.S.C. § 3575 to determine whether or not Heimerle should be sentenced as a Dangerous Special Offender. At the time of the hearing, counsel for the Government informed the Court that it would proceed for the purposes of the hearing only on the allegation that the defendant was a habitual offender pursuant to Section 3575(e)(1). On that date, Judge Pollack ruled that the defendant was a Dangerous Special Offender and made specific findings of fact in that regard on the record of those proceedings. (Tr. 731-37, App. 386-92). The Court then sentenced Heimerle to ten years imprisonment with a $10,000 committed fine.

Title 18, United States Code, Section 3575 *et seq.*, the Dangerous Special Offender statute, is a federal codification of similar statutes presenting existing in some 45 states, generally referred to as recidivist statutes. The primary legislative purpose stated by the Congress

in enacting the statute was "to see to it that convicted felons prone to engage in further crime are imprisoned long enough to give society reasonable protection." (Committee on the Judiciary, United States Senate, Committee Report, Organized Crime Control Act of 1970, p. 83).

Section 3575 provides for three different classes of defendants as being "dangerous." These classes are the habitual offender, § 3575(e)(1); the professional offender, § 3575(e)(2); and the organized crime offender, § 3575 (e)(3). The statute further provides specific standards for each category of defendant covered. With respect to the "habitual offender," the standards "focus specifically on those felons whose prior convictions make them likely to repeat" (Senate Committee Report, *supra*, p. 88). This standard requires that the defendant be convicted of two or more different felony offenses and that for the defendant be sentenced to over one years' imprisonment for at least one of the prior felony offenses; and that less than five years have elapsed since his release from custody or his commission of the last felony conviction.*

Heimerle argues that the procedure employed in the Dangerous Special Offender proceeding is violative of his right to due process in several respects. First, he argues that no evidence was offered for the "allegations under Section 3575(e)(2)". As noted above, the United States determined only to proceed with the characterization of the defendant as a Dangerous Special Offender under Section 3575(e)(1), and therefore, it was unnecessary to offer evidence to support the characterization under § 3575 (e)(2). Heimerle similarly argues that no evidence was offered to prove that the defendant "was in fact danger-

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* It should be noted that the Statute is not an attempt to try or punish the offenders for past offenses; rather his latest offense is merely considered aggravated by special circumstances. (See Senate Committee Report p. 164; also *Moore* v. *Missouri*, 159 U.S. 673, 677 (1895)).

ous". The record, of course, is to the contrary. In order for the Court to find a defendant a Dangerous Special Offender pursuant to Section 3575, it must be determined by the Court that the defendant qualifies pursuant to one of three categories set forth in Section 3575(e) and that he is "dangerous".

Section 3575(f) sets forth the standard of dangerousness under the Statute. It provides:

> A defendant is dangerous for the purposes of this section if a period of confinement longer than that provided for such felony is required for the protcction of the public from further criminal conduct.

In drafting this statute Congress added the "dangerous" requirement, which was absent from pre-existing state habitual offender statutes. (See Senate Report . . ., *supra*, at 88-89). Congress recognized that, generally, the same facts that established that a defendant was a "special offender" would also fulfill the requirements to establish that he was also "dangerous". In this latter regard the Senate Committee report noted that "dangerous" may be inferred, although not necessarily, from the requirements of subsection (e). Furthermore, Senator McClellan, Chairman of the Judiciary Sub-Committee, which processed the legislation, writing on this latter point noted:

> [This] is simply a recognition of the possibility that the same facts the establishment of which shows the defendant to fall within one or more of the definitions of "Special Offender" may, in a given case, also demonstrate that the defendant is "dangerous". McClellan, J. C. "Organized Crime Control Act or its critics: which threatens Civil Liberties" 46 Notre Dame Lawyer 55, 158. (Fall, 1970).

In considerations of the "dangerous" standard, the legislative history demonstrates that Congress viewed habitual offenders as future threats who, absent extenuating circumstances, had committed multiple crimes in the past and would be prone to do so in the future. (Committee on the Judiciary, United States House of Representatives; Committee Report, Organized Crime Control Act of 1970 at 96). The legislative history thus shows that the additional standard of "dangerous" was applied by Congress to allow Courts on a case by case basis to determine whether the Court believed the evidence supporting the Government's brief that the defendant is a "special offender" would also establish that he is "dangerous" and therefore a proper subject to impose extended prison sentences.

Recently, the Court of Appeals for the Seventh Circuit examined the concept of "dangerous" as set forth in § 3575(b). The Court held:

> Nor do we find that the term 'dangerous' is overly broad or vague for purposes of sentencing. [Citations omitted]. Factors routinely considered by a sentencing judge are the defendant's past recpresent offense, and the defendant's attitude. [Citation omitted]. Likelihood of future criminality and the potential danger of society are determinations implicit in sentencing decisions. The concept of dangerousness as defined in § 3575 is a verbalization of consideration underlying any sentencing decision.

United States v. *Neary*, 552 F.2d 1184, 1194 (7th Cir. 1977).*

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* The Seventh Circuit reflected a similar decision in the Sixth Circuit. The Sixth Circuit found that the concept of "dangerous" was "not a new concept in criminal law". In this regard the Court offered the example of the use of the term "danger" when a court must make a finding denying bail pursuant to Title 18, United States Code, Section 3148. *United States* v. *Stewart*, 531 F.2d 326, 336 (6th Cir. 1976), *cert. denied*, 426 U.S. 922 (1976).

The record of Heimerle's numerous prior felony convictions committed over a short period of time; the evaluation by the Probation Department, the defendant's unit manager, and the Court of the defendant; and his background could clearly permit the Court to find, as it did, that the defendant was dangerous under the provisions of Section 3575(f).*

As a second basis for claiming a deprivation of due process, Heimerle notes that one of the convictions considered in the sentencing has since been set aside on collateral attack. The Government concedes that one federal conviction has been subsequently set aside in the Southern District of New York due to a procedural violation of the Interstate Agreement on Detainers.** However, Heimerle had five felony convictions in addition to the conviction set aside at the time of sentencing in this case. These convictions include two New York State felony convictions; a federal conviction for violation of Title 18 U.S.C. § 1341; the conspiracy and substantive counterfeiting felonies for which the defendant was convicted before Judge Metzner in May of 1976; and the instant conviction before Judge Pollack for violation of the conspiracy statute 18 U.S.C| §371. Pursuant to the provisions of Section 3575(e)(1), the remaining convictions clearly provided a sufficient basis for the finding of Judge Pollack that the defendant was a Dangerous Special Offender.

Heimerle also argues that the Court relied upon hearsay evidence in its sentencing in that it considered the pre-sentence report prepared by the Probation Depart-

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* The procedural regularity of the sentence was enhanced by the careful oral opinion delivered by Judge Pollack on his reasons for imposing the sentence (A. 386-92).

** It should be noted that Judge Pierce's decision vacating the conviction is presently on appeal to this Court.

ment.* This claim ignores both the general law governing evidence to be considered in determining an appropriate sentence, and specific provisions governing Heimerle's case. As a general matter, in determining a sentence, "a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *United States* v. *Tucker*, 404 U.S. 443, 446 (1972). As this Court has had occasion to note, "[a] sentencing judge's access to information should be almost completely unfettered in order that he may 'acquire a thorough acquaintance with the charter and history of the man before [him].' *United States* v. *Doyle*, 348 F.2d 715, 721 (2d Cir.), *cert. denied*, 382 U.S. 843 (1965)." *United States* v. *Schipani*, 435 F.2d 26, 27 (2d Cir. 1970). In particular, a sentencing court "may and should consider matters that would not be admissible at a trial," *United States* v. *Sweig*, 454 F.2d 181, 183-184 (2d Cir. 1972), including hearsay, *Williams* v. *Oklahoma*, 358 U.S. 576 (1959); *Williams* v. *New York*, 337 U.S. 241 (1949); prior crimes of which the defendant has not been convicted, *United States* v. *Cifraelli*, 401 F.2d 512, 514 (2d Cir. 1968), *cert. denied*, 393 U.S. 987 (1969); and charges dismissed without a determination on the merits, *United States* v. *Hendrix*, 505 F.2d 1233, 1235-36 (2d Cir. 1974); *United States* v. *Mejias*, 552 F.2d 435, 446 (2d Cir. 1977). The additional procedural requirements sought

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* The specific item in the Probation Department Report the defendant objected to was the December 1975 evaluation of the defendant's unit manager in the Federal Halfway House. This evaluation noted "prognosis is poor there is nothing in his behavior to indicate that he [Heimerle] has in any substantial degree gained any desire or intent to lead a law abiding existence in the future." It is significant that this evaluation was prepared at approximately the same time Heimerle was commencing the instant conspiracy and about one month before he began to make a series of three sales of counterfeited FRNs to an undercover Secret Service Agent which lead to indictment 76 Cr. 146.

by Heimerle, while appropriate to a criminal trial on the merits, are simply inapposite in a sentencing proceeding.*

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*In *Williams* v. *New York*, 337 U.S. 241, 247 (1949), the Supreme Court spoke at length as to the considerations of Courts in sentencing. The Court noted in part:

> A recent manifestation of the historical latitude allowed sentencing judges appears in Rule 32 of the Federal Rules of Criminal Procedure. That rule provides for consideration by federal judges of reports made by probation officers containing information about a convicted defendant, including such information 'as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant. . . . 337 U.S. at 246
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> * * * * *
>
> . . . A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial. . . . . The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. *Id.* at 247.
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> Under the practice of individualizing punishments, investigational techniques have been given an important role. Probation workers making reports of their investigations have not been trained to prosecute but to aid offenders. Their reports have been given a high value by conscientious judges who want to sentence persons on the best available information rather than on guesswork and inadequate information. To deprive sentencing judges of this kind of information would undermine modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and ex-

[Footnote continued on following page]

In addition, of course, Section 3575(b) specifically provides for the use of the Probation Report by the Court in sentencing.* Finally, Section 3577 of the Dangerous Special Offender Statute notes:

> No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a Court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

The Senate Committee Report in respect to Section 3577 notes that this section "applies in all Federal Criminal cases, not only to those of which Sections 3575-76 apply". Furthermore, the report notes that "evaluated hearsay is permissible. . . . The exclusionary rules developed for trial on the issue of guilt are not to be applied." (Senate Committee Report p. 167).

Heimerle's claim of double jeopardy is also without merit. Heimerle was convicted of involvement in two separate and distinct conspiracies. The first conspiracy concerned his involvement with Harold Rosenberg to sell counterfeited FRNs to an undercover Secret Service agent.** The instant conspiracy dealt with an entirely different cast of characters, none of whom were involved

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perimentation. We must recognize that most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination. *Id.* at 249-50.

The due proces clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure. *Id.* at 251.

* The statute notes in part that authorization is given the Court to use "so much of the pre-sentence report as the Court relies upon."

** Heimerle was also convicted at the time of the substantive offense of selling counterfeited FRNs to an undercover Secret Service agent.

in the prior prosecution. It is certainly without merit to argue that two crimes are the same if they violate some of the same statutes, but involve different fact patterns and different co-conspirators.* Moreover, he representations as to the factual similarities set forth by Heimerle in his brief have no basis in the record. The counterfeited FRNs in the prior prosecution before Judge Metzner were not "yellow" as described by Heimerle in his brief.** The implication that Special Agents Hemmer and Soma (the Special Agent's actual name is Zona) were the case agents and the only agents on the case is distorton of the records of both crminal prosecutions.*** Neither indictment charges anyone named "Fat Tony" as being a co-conspirator. In short, Heimerle has not come close to meeting his initial borden of demonstrating the congruence of the prior offense and the present one. *United States* v. *Bommarito*, 524 F.2d 140 (2d Cir. 1975).

Heimerle's final argument is that he did not have sufficient notice of the Government's intention to file the Dangerous Special Offender notice. This claim is also

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* For example, this Court held in *United States* v. *Cala*, 521 F.2d 605 (2d Cir. 1975), that the double jeopardy clause did not bar prosecution for possession of counterfeit bills when the defendant had been *acquitted* of possessing *the same* bills on an earlier occasion, since the circumstances were different.

** Nowhere in the record of the prosecution before Judge Metzner is there any description of the counterfeit FRNs as being "yellow"; perhaps that is the reason why Heimerle has failed to offer a transcript citation for that allegation.

*** The record in the prosecution before Judge Metzner clearly notes Special Agent Frank McDonnell, who purchased the counterfeited FRNs in three face to face transactions with Heimerle, was the case agent. While the Government concedes that both agents Hemmer and Zona testified at that trial, it is significant that a total of five Secret Service agents testified on behalf of the Government. Similarly in the instant prosecution before Judge Pollack other Secret Service agents testified at trial and in the pre-trial suppression hearing.

meritless. In the sentencing procedure below, counsel for appellant Heimerle attempted to raise this issue but failed, as counsel has done here, to fairly reflect the record of the events surrounding the filing of that notice. The record below clearly demonstrates that counsel for Heimerle knew of the Government's intention to file a Dangerous Special Offender notice against Heimerle in Indictment 76 Cr. 442. In order to prevent the filing of said notice, counsel entered into protracted plea negotiations. In this regard, counsel indicated to the Government that Heimerle would surrender to the Secret Service plates for the manufacture of counterfeited $20, $50 and $100 FRNs, $100,000 United States Treasury bills and American Express Travelers Checks. The counsel consistently requested that the Government postpone the filing of the notice in order to give Heimerle the opportunity to consider a plea arrangement. Shortly before trial, counsel for the appellant informed the Government that the defendant had reconsidered his offer to surrender the counterfeit plates and would proceed to trial recognizing that the Government would proceed against him as a Dangerous Special Offender. This series of events is reflected in the record of the sentencing procedure below. (Tr. 704-07, A. 359-62).*

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* Heimerle represents that Judge Metzner "found in favor of Heimerle" in regards to the Dangerous Special Offender notice filed in Indictment 76 Cr. 146. The record clearly indicates that no hearing was held by the Court on the issue of the Dangerous Special Offender allegation. On the day of sentencing, Judge Metzner indicated that since he had determined not to impose a sentence greater than the maximum provided in the statutes the defendant was convicted of violating he believed the holding of a hearing to be unnecessary. The Court further noted that the Government should have charged the defendant as a habitual offender pursuant to 3575(e)(1). In 76 Cr. 146 the United States only charged the defendant as a professional criminal pursuant to 3575(e)(2).

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Frederick T. Davis being duly sworn deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 27 day of Sept 77 he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

Eleanor Jackson Piel, Esq.
36 West 44th Street
New York, New York 10036

Jeffrey Weingard, Esq.
401 Broadway
New York, New York 10013

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at the United States Courthouse Annex, 1 St. Andrew's Plaza, Borough of Manhattan, City of New York.

Frederick T. Davis

Sworn to before me this
27 day of Sept 77

Phyllis A. Rush

PHYLLIS A. RUSH
Notary Public, State of New York
No. 03-4635198
Qualified in Bronx County
Commission Expires March 30, 1978